EXHIBIT F-2

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1   potential for a secondhand user and we have
2   critical information that's in the manual that
3   he might not get or she might not get;
4   correct?
5   A.   Absolutely.
6   Q.   And therefore, there needs to
7   be another way to communicate?
8   A.   It depends on how you're
9   dealing with issue, what the issue is.
10   So, again, in this case we have
11   an atypical problem. Most bikes when you let
12   them idle at a standstill don't catch on fire.
13   A lot of people allow their bikes to warm up
14   at a standstill for different periods of time
15   that are not aware that this is a potential
16   problem with the BMW R 1150.
17   Because of that they needed to
18   find a different way to communicate that
19   information to the user if they're going to
20   choose not to fix it by changing the design or
21   providing a necessary safeguard.
22   Q.   I can understand why you don't
23   want to answer my question. So let's try it
24   again. This issue, I don't need to hear your

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1   opinion on this issue, I think I've heard it
2   100 times perhaps.
3   My question is: Your
4   criticizing my client on relying on a manual
5   to communicate critical safety related
6   information and warnings, plural, to secondary
7   owners; correct? You criticized my client for
8   that, yes?
9   A.   I -- yes, it's --
10   Q.   Is this the only -- is this
11   issue the only critical safety related
12   information or warning that has to be
13   communicated in some other manner if we accept
14   your criticism?
15   A.   I'm sorry, I did not analyze
16   the complete BMW R 1150 R to determine what
17   other defects may or may not have been present
18   and what other critical warnings or safety
19   information needs to be presented on the bike.
20   Q.   Should Harley-Davidson be
21   concerned about the same thing?
22   A.   Harley-Davidson doesn't have
23   the same defect, so I wouldn't think they
24   would be concerned about the same thing.

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1   Q.   Okay. Does Harley-Davidson
2   have to be concerned about critical safety
3   related warnings not being communicated to
4   secondary owners?
5   A.   I think that Harley-Davidson in
6   their hazard analysis and safety analysis of
7   their motorcycles would want to see what
8   hazards are associated with its product,
9   eliminate those that they can through design,
10   provide adequate safeguards and then determine
11   whether or not a warning in the manual is
12   appropriate or whether or not it needs to be
13   on the product because it's atypical and not
14   something that most riders would be aware of
15   or think about.
16   MR. HEINOLD: Ken, I'm getting
17   this close to saying let's go see a Judge.
18   MR. LEVINE: I think it's a
19   middle ground, frankly. I think that he can
20   answer the questions yes or no and then give
21   an explanation.
22   MR. HEINOLD: You know what I'm
23   asking. You know what I'm asking. You don't
24   have to admit this on the record. You know

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1   what I'm asking and you know he's not
2   answering.
3   MR. LEVINE: I'm going to
4   disagree with that. And I agreed with you
5   before, by the way. I agreed with you before
6   that he wasn't answering your question.
7   You're asking him something
8   that from his analysis standpoint takes a lot
9   more than a yes or no. It just does. You can
10   tell the way that this witness does his
11   analysis.
12   MR. HEINOLD: Excuse me for
13   interrupting --
14   MR. LEVINE: No, it's okay.
15   The truth is -- you want to know -- the last
16   question was does Harley-Davidson need to put
17   any specific -- let me use the proper words
18   here, any specific critical safety related
19   information physically on their bikes?
20   MR. HEINOLD: No, I didn't say
21   that.
22   MR. LEVINE: I apologize, I
23   thought that was your question.
24   MR. HEINOLD: I didn't say that

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1 at all.
2   MR. LEVINE: I thought that was
3 your question.
4   MR. HEINOLD: I'll tell you
5 what, I'm going to tell you, okay, and then
6 you see if he answers the question.
7   MR. LEVINE: Fair enough.
8   MR. HEINOLD: Okay.
9   MR. HEINOLD: This is an
10 explanation with a question at the end. I'm
11 sure you're intelligent to follow it and not
12 have to sort through it and say this big long
13 thing.
14   MR. LEVINE: I'm ready.
15   MR. HEINOLD: He's made a
16 statement critical of my client for relying on
17 a manual to communicate critical safety
18 related information to people who buy used
19 motorcycles because they might not get it.
20   MR. LEVINE: Yes.
21   BY MR. HEINOLD:
22 Q. Correct?
23 A. Sure.
24 Q. Okay.

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1   MR. HEINOLD: So, I want to
2 know is this the only critical safety related
3 information, this issue in this case, to which
4 he's referring, or is he talking generically?
5   MR. LEVINE: I can answer your
6 question.
7   MR. HEINOLD: I know you can
8 answer it.
9   MR. LEVINE: And I believe that
10 he has, actually.
11   MR. HEINOLD: What do you think
12 the answer is?
13   MR. LEVINE: As written there,
14 it was meant to express the concept in
15 general.
16   MR. HEINOLD: In general?
17   MR. LEVINE: Yes, in general.
18   MR. HEINOLD: That means, Ken,
19 does it not, that there's more than one issue
20 that has to be communicated in a critical
21 safety related warning in an alternate --
22   MR. LEVINE: There may be.
23   MR. HEINOLD: There may be.
24   MR. LEVINE: There may be, I

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1 agree with that.
2   BY MR. HEINOLD:
3 Q. So I accept the proposition
4 there may be. Do you accept that proposition?
5 A. If you asked that question I
6 would say maybe, sure.
7   MR. LEVINE: And also, then you
8 said to him what other critical related safety
9 information would be required? To which I
10 believe the witness said, I have not analyzed
11 the bike for any other issue other than this
12 particular one, which I found to be of a
13 critical related, safety related information
14 issue. And then I believe --
15   MR. HEINOLD: And then I think
16 he went on to --
17   MR. LEVINE: Well, he does his
18 thing.
19   MR. HEINOLD: -- a soliloquy.
20   MR. LEVINE: Well, let me say
21 this to you in defense to the gentleman to my
22 right, and that is this: We continue to focus
23 on whether or not it was right or wrong for a
24 warning to be placed on the bike, because I

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1 know that's part of this case, but when asked
2 about the behavior, whether or not that was
3 right or wrong, inherently as an ergonomics
4 guy he also wants to say that we should never
5 even -- in addition to your focus on that
6 issue, we should never have gotten there, and
7 he is fearful that it will get lost in the
8 wash and then it will be only the answer to
9 the very isolated question you have.
10   By the way, you then went on to
11 ask him about the Harley-Davidson, whether or
12 not their critical related safety information
13 that they should have physically put on it, to
14 which he went into his very long answer that I
15 haven't analyzed the Harley-Davidson.
16   MR. HEINOLD: I asked that
17 because he wouldn't answer my other question.
18 It's a simple question.
19   MR. LEVINE: I can answer that.
20   BY MR. HEINOLD:
21 Q. It's a simple question. If
22 you're not going to produce the manual -- if
23 they're not going to get the manual because
24 they're a secondhand user, would you agree

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1   with me there's probably a whole bunch of
2   stuff that they ought to know that they're not
3   going to get?
4   A. It's possible.
5   Q. Okay, it's possible. And if
6   they're not going to get it, is the solution
7   to put something on the product?
8   A. It depends on what the issue
9   is.
10 Q. You hold open the possibility
11 that you might have other -- you haven't done
12 the analysis, I understand that, to hold open
13 the possibility that there might be other
14 issues that you have to put on the product?
15 A. Anything is possible.
16 Q. You don't know?
17 A. I don't know what?
18 Q. You don't know whether there
19 would or wouldn't be more?
20 A. As I said earlier, I did not
21 analyze the complete bike to determine what
22 other defects there may be that would require
23 a warning because BMW chose not to deal with
24 it in its design.

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1   Q. You've talked about on-product
2   warning is necessary because of the clutter of
3   information, 89 Pages of the Rider's Manual;
4   correct?
5   A. That is a problem with
6   presenting warnings in manuals.
7   Q. Can you have too many
8   on-product warnings?
9   A. Sure.
10 Q. Can you create clutter there?
11 A. Sure.
12 Q. Can it interfere with
13 understanding awareness and recollection?
14 A. Of each -- or a single
15 individual warning, sure.
16 Q. Is there any study or research
17 or literature that tells how many such
18 warnings would create clutter?
19 A. There's not research that's
20 going to tell you any given situation whether
21 or not it would be considered clutter or have
22 a detrimental effect on the individual's
23 warnings ability to draw attention, have
24 somebody read it and understand it.

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1   It would be the manufacturer's
2   responsibility to do that study to determine
3   what may or may not be appropriate.
4   Q. In the human factors world of
5   expertise, are there any warnings or
6   instructions, warnings or research that would
7   tell you that?
8   A. Tell me what?
9   Q. Tell you about how -- how to
10 determine how many warnings there would be so
11 as to avoid interference with understanding?
12 A. Sure, there's all kinds of text
13 and research, not necessarily text,
14 publications, guidelines on how to conduct
15 usability testing on your product to determine
16 whether or not a warning is appropriate,
17 whether the number of warnings you're
18 providing is appropriate.
19   I conducted many of tests like
20 that when I was with the IBM Corporation to
21 determine what worked and what didn't work.
22 Q. On what?
23 A. On products.
24 Q. No, but on-product warnings?

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1   I'm talking about --
2   A. Yes, on-product warnings and
3   manual warnings, whatever the case may be.
4   Again, and I know you don't
5   want to hear it, but the warning design is an
6   integral part of the product design. You
7   don't wait until the product is done and then
8   figure out that you have all these unaddressed
9   hazards and now you have to figure out what
10 warnings you're going to stick on the product
11 to make it safe.
12   You determine what hazards
13 there are with your product, and then you go
14 through the safety hierarchy, which ones can I
15 eliminate through design, which ones can I
16 minimize through design, which ones can I
17 provide a safeguard for.
18   At the end of the day what
19 happens is that list of hazards shrinks, and
20 now you're down to whatever residual hazards
21 are left and you have to decide on how you're
22 going to warn. And part of that decision is
23 what goes on the product, what goes in the
24 manual. And you decide that based upon

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1 consequences such as death and severe property
2 damage as opposed to a paper cut and maybe I
3 ruined the chrome on my exhaust. So there's
4 different levels of the severity of the
5 hazard.
6   You deal with it based on how
7 you expect people are going to use your
8 motorcycle, how people use the other
9 motorcycles and the knowledge that the people
10 are most likely going to have.
11   So if it's an issue well, we
12 want to warn people to wear a helmet, that's
13 probably not something you need to put on the
14 bike itself, but something you can regulate or
15 set off into the manual.
16   But if you have a unique fire
17 hazard associated with the design of your oil
18 sight glass, that's something that can lead to
19 severe consequences, including severe injury
20 or death and property damage. And two, it's
21 inconsistent with the way you know people use
22 bikes. And three, it's inconsistent with
23 people's knowledge of how you can safely use
24 the bike.

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1   So those three factors make it
2 important that it be on the product as opposed
3 to another hazard that may not be as severe or
4 people may know about it generally or is
5 consistent with how people typically use their
6 bike.
7 Q. Have you done an analysis for
8 this bike, this manual, to determine whether
9 there should be any other on-product warnings?
10 A. I have not.
11 Q. Do you agree or disagree with
12 the possibility that there might be the need
13 for one if you did that analysis, one or more?
14 A. It's certainly possible. 1
15 showed you a photograph of that Yamaha earlier
16 that had two warnings that were conspicuously
17 placed on the motorcycle, one on the
18 windshield and one on the top of the gasket.
19 Q. We didn't get copies of those
20 yet. You referred to the fact that you had
21 looked at them and had it included in your
22 report, but I didn't see them yet.
23 A. I'm sorry, I'll pull them out
24 right now. There you go.

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1   MR. LEVINE: Off the record.
2   - - -
3 (Whereupon a discussion was held off
4 the record.)
5   - - -
6   BY MR. HEINOLD:
7 Q. One warning says: Before you
8 operate this vehicle read the Owner's Manual
9 and all labels. The other says: Always wear
10 approved motorcycle helmet, eye protection and
11 protective clothing. The other on the
12 windshield says: Caution, cleaning with
13 alkaline or acid cleaner gasoline solvent will
14 damage the windshield. Use neutral material.
15   Do you believe both of those
16 are necessary?
17 A. I didn't do an analysis to
18 determine if they were necessary on that
19 Yamaha. I brought those pictures to depict
20 the fact that some manufacturers do, in fact,
21 put multiple warnings that they feel are
22 necessary on the bike.
23 Q. So you haven't done an analysis
24 of whether there might be others that you

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1 would think would be appropriate to put -- to
2 use as on-product warnings if that was the
3 issue before you; correct?
4 A. I think that I've answered this
5 multiple times, but I have not done that
6 analysis. So I do not have an answer to your
7 question.
8 Q. Are there any guidelines that
9 say how many is too many?
10 A. There are no guidelines that
11 say how many is too many. If you have a list
12 of warnings or hazards that you rely upon
13 warnings, the guideline is to make sure that
14 during design you're eliminating those that
15 you can through design and provide guards for
16 those you can't.
17   When you've gone through that
18 process and you are left with the warnings,
19 then you have to determine how you're going to
20 present it. And it can be on the product or
21 in the manual, and that decision is based upon
22 those things I talked about earlier.
23 Q. And if you've gone through all
24 of that and you determined that there are a

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1 lot of things that you want to put on -- a lot
2 of labels and warnings and instructions that
3 you want to put on the motorcycle so that
4 someone doesn't sue you if they don't follow
5 it, are there -- is there any literature, is
6 there any scientific approach to say how many
7 is too many?
8 A. There is a scientific approach.
9 Q. What is it?
10 A. It is the manufacturer's
11 responsibility to do their testing. If
12 they've got that many warnings left over that
13 they decided need to be on the bike they
14 better go and do their testing to insure that
15 they can do it appropriately. If they can't
16 do it appropriately, then they need to start
17 reconsidering whether or not they should be
18 offering that product for sale.
19 Q. But from a warnings standpoint,
20 an expert such as yourself, there's no
21 guideline that says woh, that's too many,
22 right?
23 A. There's no specific number of
24 warnings that are considered too many

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1 warnings.
2 Q. But you agree that someone
3 could put too many on there?
4 A. A lot of manufacturers do.
5 Q. On product?
6 A. On products.
7 Q. And when you say they do, you
8 mean they do put too many on there?
9 A. Absolutely.
10 Q. And the consequence of that is
11 an interference with the whole purpose of
12 having the warning in the first place?
13 A. It can have a detrimental
14 effect on any single or any individual warning
15 within that clutter.
16 Q. But that decision has to be
17 made individually by a manufacturer?
18 A. It needs to be made by the
19 manufacturer. They're in control of their
20 product.
21 Q. But there's no technique, no
22 guideline, no peer-reviewed studies, no any of
23 that they can refer to that says this is --
24 here's the guidelines?

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1 A. Again, there are guidelines on
2 what you do. You can reference some of them
3 in my report. The very first reference is the
4 National Safety Council's Accident Prevention
5 Manual for Business and Industry
6 Administration Programs, 12th Edition. In
7 there they give a whole chapter, I've cited on
8 loss control and product safety. They tell
9 you the process that you need to go through to
10 analyze the hazards associated with your
11 product to determine how you're going to
12 mitigate it.
13   There are references and
14 guidelines with respect to determining which
15 warnings need to be on the product versus
16 need -- or could be in the manual.
17   Then after you decided which
18 can be eliminated or which should be
19 eliminated through design, which should be
20 guarded, so it's the residual hazards such as
21 hazards, all hazards, the residual hazards,
22 maybe that's a key step I'm not emphasizing
23 enough.
24   MR. LEVINE: Oh, you're

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1 emphasizing.
2   BY MR. HEINOLD:
3 Q. You're emphasizing.
4 A. But then there is a list of
5 other warnings related references that I cited
6 that deal with how to determine what warnings
7 go on the product, what warnings don't, and it
8 gets down to the severity of the injury, the
9 likelihood of the people having the knowledge
10 beforehand, and how the product is typically
11 used or commonly used.
12   So those three factors hedge to
13 the fact that it needs to be on the product.
14 If you have several hazards that are
15 associated or have that same characterization
16 and you decided that they need to be on the
17 product, now you go do your own testing to
18 determine how you're going to best present
19 them. And if you can't best present them,
20 then you got to question whether or not it's
21 safe to launch the product into the
22 marketplace.
23 Q. Okay. So that's my question.
24 You did all of the dissertation about how to

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1   decide if you need to put a label on a
2   product, and then the question that I'm
3   interested in is: Well, then how many can you
4   put on there? And you said you would have to
5   do your own testing. That's the answer to
6   that question, right?
7   A.   It's an empirical question.
8   Yes.
9   Q.   Okay. So then you agree with
10   me that when I'm -- well, you're agreeing with
11   me because I'm not -- I'm asking the question,
12   but my understanding from what you said is
13   that there are no guidelines about how many
14   you can put on the product so that you don't
15   achieve clutter and interference, or where you
16   have to put them, if you've got a product, you
17   got multiple warnings, you have to determine
18   that individually; correct?
19   A.   Well, part of what you said was
20   correct. Part of what you said was incorrect.
21   Q.   What part was correct?
22   A.   That you have -- you're the
23   product manufacturer, it's your product,
24   you're going to have to decide where to put

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1   those warnings if you have multiple warnings.
2   Q.   Okay. How many?
3   A.   That's up to the manufacturer
4   to decide. If they narrowed it down that they
5   have of list of two, 10, 20, whatever the case
6   may be, they have to decide can they do that
7   adequately.
8   Q.   Okay. And there's nothing that
9   they can refer that gives them the important
10   factors about how to make that decision; is
11   that right?
12   A.   That's not right.
13   Q.   Okay. Where is it?
14   A.   The guidelines talk about what
15   warnings should be -- how you prioritize
16   warnings.
17   Q.   Yes.
18   A.   Okay. Now, once you prioritize
19   it and you're trying to decide which ones go
20   on the product or how many, I should say, can
21   fit on the product, that's empirical testing.
22   There's guidelines how to conduct usability
23   testing. There's, you know, dozens and dozens
24   of books on how to conduct usability testing.

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1   If you don't have the ability
2   in-house, you hire a human factors consulting
3   company to do it for you. You guys can call
4   me, I'd be happy to do it for you. I offer
5   that service.
6   Q.   Did you say usability testing?
7   A.   Yes.
8   Q.   What is usability testing?
9   A.   Usability testing is, in
10   essence, taking your users and providing them
11   or allowing them to interface with your
12   product and determine whether or not whatever
13   feature you're interested in is usable.
14   So, in the case of warnings,
15   you want to know whether or not the two,
16   three, four, five or how many warnings you're
17   considering putting on the product, the place
18   where you're considering to put it on would be
19   effective. So you run them through hands-on
20   testing with the product.
21   You can even start with doing
22   mock-ups, pencil paper mock-ups where you're
23   just showing users the design. If this is the
24   design of a motorcycle and I put a warning

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1   here, would this capture your attention? You
2   can mock it up with Styro-foam if you have,
3   physically place the warnings where you think
4   that they're relevant or should be placed and
5   have the users conduct tasks and determine
6   whether or not they're seeing them, reading
7   them, understanding them and complying with
8   them.
9   As you get farther along in
10   developing, you can actually take the
11   motorcycle and have alternative places where
12   you're going to test to determine what works
13   and what doesn't work. This is all empirical
14   testing.
15   Q.   If somebody was to come in this
16   case and say we need 25 labels, and that's too
17   many because it will create clutter, what
18   would you have to do to say no, they're wrong,
19   in terms of creating clutter?
20   MR. LEVINE: Can I interrupt
21   for one second just so I understand. Do you
22   mean 25 in one place or 25 all over the
23   product?
24   MR. HEINOLD: All over the

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1 product.
2   THE WITNESS: First I would
3 want to know why they have that many. That
4 would be the absolute first question. I'd
5 want to know what was done to eliminate
6 through design, what was done to guard against
7 it. Then I would want to know the
8 prioritization that was given to each of the
9 warnings. Then I want to know were they
10 relevant to on the bike, when they're
11 relevant, where they're relevant.
12   So, for example, if it has
13 something to do with bleeding the brakes, for
14 example, the warning being placed on the gas
15 tank is probably not the appropriate place for
16 it. You would probably want it down on the
17 caliber. So it could be that when you get
18 done you can find the spots that are relevant
19 on the bike and place them specifically at
20 those spots and you decrease the issue of
21 clutter.
22   If they're all relevant to the
23 tank, the gas tank, let's say you've got 10
24 warnings that are related to the gas tank, I

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1 don't see how that's possible, then you got to
2 look at whether or not they can be combined
3 into a single one.
4   I think the -- for example, the
5 Yamaha warning that you looked at earlier,
6 there was two different topics addressed in
7 the same warning, so that's a multi topic
8 warning. That's one way to reduce it. You
9 know, there's just multiple ways of doing it.
10 Q. So, if somebody said look, we
11 have made a determination that we need to put
12 20 stickers on the gas tank, what would you
13 have to do to say no, that would be clutter,
14 that would be too many?
15 A. Again, I would have to look at
16 what was done from a hazard analysis --
17 Q. You said all that. I'm
18 assuming you've done that. Now we've
19 concluded that there's 20 pieces of
20 information that need to be imparted in order
21 for us to feel as if our product is safe, but
22 we're concerned about clutter so we can't do
23 that, what would you have to do to determine
24 whether that would create clutter and be an

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1 interference with the transmission of useful
2 safety information or not? Usability test?
3 A. Again, I can offer to do the
4 usability testing. I can look at it and do a
5 heuristic evaluation of it.
6   MR. LEVINE: A what?
7   THE WITNESS: Heuristic.
8   BY MR. HEINOLD:
9 Q. That's off the cuff?
10 A. I'm sorry?
11 Q. Is that like off the cuff?
12 A. No. It's done based on what
13 the professional knowledge and experience
14 looking at the standards, guidelines and
15 recommendations are from warning design,
16 seeing whether or not you can meet those. So
17 that's a certainly a way to do it.
18   But again, you've got a
19 hypothetical that is so outlandish that it
20 stretches the imagination in the realms of
21 possibility. If you have 20 different
22 warnings that had to go on the gas tank, you
23 know, my first inclination is that you can't
24 do it, that this is ridiculous. You shouldn't

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1 have this many hazards associated with the gas
2 tank. What did you do differently or wrong
3 with your design that requires 20 different
4 warnings on the gas tank.
5 Q. So if I distill all this, you
6 would have to do a usability test to determine
7 whether that particular decision of 20
8 stickers on the gas tank would create clutter
9 or interfere with the transmission of safety
10 information because, as I understand, there's
11 no guideline that says anything more than five
12 is too many, you need to have five to seven,
13 you know, anything like that?
14   You would have to look at all
15 the other things you talked about to make that
16 kind of decision; is that right?
17 A. I would say you're incorrect.
18 For 20 different warnings on the gas tank, I
19 think I can safely look at that and say that
20 that would be inappropriate and inadequate.
21 Q. Well, what -- that would be
22 your opinion, right?
23 A. That would be my learned
24 opinion based on my education, training and

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1   experience.
2   Q. Well, what would -- how about
3   five?
4   A. Again, I'd go through the same
5   process, determine why there's five that you
6   would have to put on.
7   Q. No, I got that process. I'm
8   talking about we reached that point.
9   See, here's my question --
10 A. Then I think --
11 Q. -- it's a simple one.
12 A. Well, do I get to answer or do
13 I get interrupted again?
14 Q. Oh, you'll get interrupted
15 again if you keep giving the same answer,
16 non-answer.
17 A. I'm sorry, go ahead. You keep
18 asking the same question over and over again.
19 Q. You're right, I do. You keep
20 answering the same question. Here's the
21 problem, your answer isn't my question.
22 A. It depends on the situation.
23 I'd have to look at it and give you my
24 opinion.

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1   Q. My point is simply this: You
2   would be guided by your experience and your
3   knowledge of what an individual warning ought
4   to be and whether it's an appropriate
5   communication, not by a reference manual or a
6   study that says this many warnings create
7   clutter or any testable hypothesis, yours you
8   would be testing to create answers, right?
9   A. I don't know what you're trying
10 to ask me, and I'm having a hard time giving
11 you an answer because I'm sure if I give you
12 an answer you're going to tell me it wasn't
13 responsive to your question.
14 Q. Likely.
15 A. So please try to maybe break
16 that question apart, rephrase it.
17 Q. Well, my point was this: If
18 you had a question as to whether a certain
19 number of labels created clutter or
20 interference of with a transmission of safety
21 information, you would conduct a usability
22 study in order to answer that question;
23 correct?
24 A. I would evaluate it, and

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1   depending upon the situation would determine
2   what type of tool I used to evaluate it.
3   Q. Okay. And within the arsenal
4   of tools, what would they be?
5   A. Well, the usability study would
6   be one of them. A heuristic evaluation would
7   be one of them.
8   Q. Okay. Anything else?
9   A. You need to go through a litany
10 of different tools that are available to a
11 manufacturer or a consultant.
12 Q. That is specific to that
13 question?
14 A. There's multiple different ways
15 you can do it. You can perform hallway
16 testing on it. You can perform focus group
17 testing on it. There's different fidelities
18 in your usability testing. So there's
19 different ways to skin the cat. It depends on
20 the situation.
21 Q. You mentioned a few moments ago
22 making a decision on whether an on-product
23 warning is appropriate or not. Let's say
24 necessary. Okay, you would evaluate whether

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1   an on-product warning is necessary.
2   What are the guidelines,
3   factors that you have to consider?
4   A. I went through them multiple
5   times.
6   Q. Are they written anywhere or is
7   this just a general --
8   A. They're written in the
9   references I cited and other references. I
10 determined an organization of warnings.
11 Q. Those references give you the
12 guidelines about -- I understand you have an
13 opinion, all right. I want to look at what
14 field that you claim expertise says about
15 that. That's what I'm looking for.
16   Is it these references?
17 A. The easiest one to point is
18 the -- I see the Warnings and Risk
19 Communication most likely has a chapter
20 dealing with the prioritization of warnings.
21 I didn't bring a reference specifically cited
22 to address that topic because it wasn't -- I
23 didn't think it was relevant or necessary.
24 Q. What, how to decide whether or

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1 not you need an on-product warning, you didn't
2 think it was a relevant or necessary topic for
3 this deposition?
4 A. Well, BMW North America
5 determined what was needed.
6 Q. Well, you determined that their
7 determination was wrong?
8 A. No. I determined that it was
9 right. Then when they put on the warning on
10 the product in 1997 for the same type of
11 hazard, that was the appropriate thing to do.
12 What they did for the incident bike was
13 inappropriate.
14 Q. It's correct that BMW North
15 America didn't make those determinations.
16 That's the Defendant in this case. You're
17 aware of that, right?
18 A. I'm aware that BMW North
19 American administered the recall.
20 Q. Okay. They didn't make the
21 determinations?
22 A. They could have administered
23 however they wanted. They were the responding
24 party in this country.

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1 Q. Okay. So, I thought you were
2 giving me an answer and then you appeared to
3 back away from the answer in terms of the
4 guidelines that says and the factors that say
5 whether on-product is necessary or not?
6 A. Looking at chapter -- or
7 Reference 3, Wogalter and Vigilante, that's my
8 chapter in the Handbook of Warnings, I notice
9 the date on there is incorrect, it should be
10 2006, not 1999, does deal with location and
11 prioritization. Peters, 15 cardinal
12 principles to ensure effectiveness of warning
13 systems will deal with location of warning
14 information.
15 Q. Any others?
16 A. I'm not seeing offhand.
17 Q. So, if I read that, I'll
18 understand the factors that one would apply to
19 determine whether an on-product is necessary;
20 correct?
21 A. I don't know what you
22 understand, but the information is in there.
23 Q. Let's say somebody who
24 understands would be able to follow guidelines

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1 that you embrace and say this warning
2 qualifies or this warning doesn't?
3 A. I think your expert referred to
4 the Handbook of Warnings that I authored, two
5 chapters and edited two other chapters in his
6 report. So I think that's probably a very
7 good resource for you.
8 Q. Okay. Let's assume we have a
9 purchaser of a used motorcycle who didn't get
10 the manual. Are you with me?
11 A. Sure.
12 Q. What information can you think
13 of, as you sit here, needn't be an exhaustive
14 list, but what information would that person
15 need to know before he or she got on the
16 motorcycle or attempted to operate it?
17 A. It depends.
18 Q. On what?
19 A. Their experience, the manner in
20 which it's set out. Maybe the person selling
21 it to them gave them some tips and
22 information.
23   Mr. Yazdani testified he didn't
24 read the manual until after he drove the thing

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1 back to Boston. So he's on a multi hundred
2 mile trip before ever picking up and reading
3 that manual.
4 Q. Do you think that's a good
5 idea?
6 A. Yes. We talked about this
7 before. I think it's reasonable that if you
8 don't feel that you need to read the manual,
9 that many people, reasonable people won't read
10 the people. That's why you can't depend upon
11 the manual to inform them of critical safety
12 information.
13   So, you know, it gets back to
14 the question if you feel you need to read the
15 manual, if you have no idea how to use the
16 product, then it's probably necessary and
17 reasonable for you to read a manual.
18   I bought my new car in
19 December. I drove home from the dealer
20 without reading the manual. It's a several
21 hundred page manual. I can tell you I haven't
22 read the thing front to back because I don't
23 have the time to do it. So I looked at some
24 information that I was interested in that I

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1 didn't need to know like how to set the
2 navigation, and that's it.
3   If there was something uniquely
4 dangerous about that car I would have hoped
5 that the dealer and/or the on-product warning
6 would have told me.
7 Q. Let's use the most common
8 denominator, a used purchaser who might not
9 know very much, bought it used?
10 A. How do you know they don't know
11 it very much?
12 Q. Let me ask you this: You've
13 been critical of the reliance on the manual to
14 communicate important safety information to
15 secondhand purchasers who may not get the
16 manual. So if that's the case, doesn't there
17 have to be some baseline of basic information
18 that should be communicated if your criticism
19 is valid, in some other method?
20 A. Sure.
21 Q. I'm not asking for the
22 baseline.
23 A. Sure, absolutely.
24 Q. Okay. So what's the baseline?

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1 A. The baseline, for example, with
2 a motorcycle is that they are typically
3 operated the same way. They have two levers
4 at the handlebars, one's a clutch, one's a
5 brake, they have two pedals, one on each side,
6 one's for the gears, one's for the rear
7 brakes. If a person gets on a motorcycle
8 they've never driven before and the buttons
9 for start, stop, or what have you, are clearly
10 labeled, they would probably get on that
11 motorcycle and drive away.
12   Now, you do recall that I had
13 three used Harley-Davidsons and I'm not sure
14 that one of them came with an Operator Manual,
15 but I do know when I rode it home from where I
16 bought it I didn't read any of the Operator
17 Manuals. I think at least two, if not all
18 three of them, I didn't get the manual until
19 much later until, which means I had been
20 riding around on that bike for a while without
21 reading and never did I feel unsafe or never
22 did I feel that I was doing something wrong or
23 unsafe or incorrect.
24   Now, if you were to put a

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1 product out on the market that is like a
2 motorcycle, but has different controls, maybe
3 there's no hand levers, maybe there's three
4 pedals on one side and none on the other, then
5 you're probably going to need a manual or if
6 somebody teaches you how to use it or how to
7 ride it.
8   But if you're talking about
9 basic operation, there's no need to read the
10 manual. If you're not planning on doing your
11 own maintenance, as Mr. Yazdani apparently
12 wasn't, there's no reason to go into the
13 manual to figure out all these different
14 things related to maintenance. You take it to
15 the shop, and BMW North America makes money
16 because the dealer charges a lot to have you
17 maintain the bike. So, again, it's a -- it
18 just depends on the bike and the situation.
19 Q. Do you think you answered my
20 question?
21   MR. LEVINE: I actually think
22 he gave you more than you ever asked for.
23   MR. HEINOLD: Oh, absolutely.
24 You think the answer's in there?

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1   MR. LEVINE: I do believe the
2 answer to that one is in there.
3   You are asking him some
4 questions about minimal things that -- you're
5 very broad in these circumstances.
6   MR. HEINOLD: Absolutely.
7   MR. LEVINE: You're very broad
8 in these circumstances. So his answer, to be
9 complete, is to be very broad as well. I
10 think that it is very hard in this instance to
11 come up with a very concise question that will
12 allow for a very concise answer when you're
13 talking about these warnings topics.
14   But keep trying, and if I think
15 he's offensive or going astray, as I have in
16 the past, I would either cut him off, I'll ask
17 him to answer directly. I'm more helpful than
18 the average opposing counsel.
19   MR. HEINOLD: You probably are,
20 but I agree to disagree on this one.
21   MR. LEVINE: Okay.
22   THE WITNESS: Do you mind if we
23 take a five-minute break?
24   MR. HEINOLD: Sure.

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1   - - -
2 (Whereupon, a short break was taken at
3 this time.)
4   - - -
5   BY MR. HEINOLD:
6 Q. Do you think the warning that
7 you've been discussing about the risk of fire
8 is the most important warning in regard to
9 operating this motorcycle?
10 A. The most important warning with
11 respect to my opinions in this case, yes.
12 Q. With respect to operating the
13 motorcycle?
14 A. I don't think I went through
15 all the different warnings for operating
16 motorcycles.
17 Q. So the answer is you don't
18 know?
19 A. I don't know.
20 Q. This proposed warning on Page
21 14, what size is it?
22 A. That's actually the size that I
23 intended. No, I take that back. I did print
24 out the actual size. That's about the size I

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1 intended.
2   MR. HEINOLD: Let's mark this
3 as an Exhibit.
4   - - -
5 (Whereupon, Exhibit Vigilante-5 were
6 marked for identification.)
7   - - -
8   MR. HEINOLD: I don't know if
9 we gave a list of the Exhibits thus far.
10 Vigilante-1 is the report. Exhibit 2 is the
11 Testimony List. Exhibit 3 is the C.V.
12 Exhibit 4 is what was marked as Yazdani-1.
13 And Exhibit 5 is the actual warning and size
14 which the witness has printed and provided.
15   BY MR. HEINOLD:
16 Q. Where would you place it
17 precisely?
18 A. Oh, I don't know that I have to
19 be pinned down to a precise location, but
20 certainly on top of the gas tank, on the
21 handlebars between the clamps and then on the
22 console or even on the center pivot.
23 Q. Can you take whatever photo
24 you're referring to and pull it out and mark

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1 where you think it should be in order to be
2 effective?
3 A. There's multiple locations, but
4 I'll be happy to.
5 Q. Identify as many of them as you
6 can, please.
7 A. (Witness indicates.)
8 Q. Can you prioritize which ones
9 you think is best or how did you reach that
10 decision?
11 A. I think they all would be fine
12 (indicating).
13 Q. Are you finished?
14 A. Yes.
15   MR. LEVINE: For the record,
16 the witness put X marks on I believe four
17 locations on two pictures.
18   - - -
19 (Whereupon, Exhibit Vigilante-6 was
20 marked for identification.)
21   - - -
22   BY MR. HEINOLD:
23 Q. Page 15 of your report --
24 A. Okay.

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1 Q. Finding number 4, you say that:
2 This warning failed to meet contemporary
3 industry standards, guidelines and practices.
4   Can you identify what those
5 contemporary industry standards, guidelines
6 and practices are?
7 A. Sure, Page 17, I'll just give
8 you the numbers, if that's okay.
9 Q. All right.
10 A. Number one, these are my
11 references --
12 Q. On Page 17, sorry.
13 A. Number 1, Number 2, Number 3,
14 Number 4, Number 5, Number 6.
15 Q. 1, 2, 3, 4, 5, 6, is that what
16 you said?
17 A. Yes.
18 Q. 1 through 6?
19 A. Yes, and then -- that's fine.
20 Q. And do you believe that the
21 warning in the manual violated ANSI Z535.4?
22 A. I'm sorry, one more time. Do I
23 believe that it violated it?
24 Q. Is it your opinion that the

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1 warnings on this issue in the manual violated
2 ANSI Z535.4?
3 A. That's for on-product safety
4 signs and labels. This is in a manual.
5 Q. So the failure to comply is
6 because there was no on-product safety?
7 A. Yes.
8 Q. Okay. Do you believe that the
9 on-product label that was provided with the
10 recall product, provided to the recall product
11 violated Z535.4?
12 A. Well, it depends on which part.
13   MR. LEVINE: I think he was
14 done with his answer, by the way.
15   MR. HEINOLD: It depends on
16 which part. I guess I was waiting for him to
17 tell me which part violates it and which part
18 doesn't.
19   THE WITNESS: I'm sorry, I was
20 trying to keep the answer short.
21   BY MR. HEINOLD:
22 Q. Which part violates it and what
23 part doesn't?
24 A. Well, the on-product where ANSI

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1 Z535.2 requires it be located at the time and
2 location the information necessary is met.
3 But the parts requiring signal word were not
4 met. The parts requiring the formatting of
5 the signal word were not met. Parts
6 recommending a border were not met. Parts
7 recommending a signal word icon were not met.
8 Q. You said signal word --
9 A. Icon?
10 Q. No. Then you said a second
11 thing. Then you said border and then you said
12 a signal word icon.
13 A. Oh, I'm sorry, the first was
14 just a signal word.
15 Q. Right. And then what was the
16 second one?
17 A. I said there was -- I don't
18 remember the order of them.
19 Q. You said four. I only wrote
20 down three. We can read it back or you can
21 tell me the four again.
22 A. There was no signal word, no
23 signal word icon. There's no format. A
24 signal word header is not format. There was

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1 not signal word header, orange, safety orange,
2 no border.
3 Q. Is Z535.4 mandatory?
4 A. Is it mandatory? No, it's
5 not -- well, I'm sorry, it depends.
6 Q. What does it depend on?
7 A. It depends on whether there's a
8 Federal regulation that calls out the
9 requirement to meet it or not. So there are
10 some Federal regs that require it be met. But
11 in this case I don't think it's required. So
12 sorry.
13 Q. In this case, Mr. Yazdani's
14 intention was to start the motorcycle, to warm
15 it up, go outside and smoke a cigarette for
16 seven or nine minutes, come back and turn it
17 off. Is that your understanding?
18 A. That's my understanding.
19 Q. All right. And is it your
20 understanding he got distracted and forgot?
21 A. That's my understanding.
22 Q. And that he walked back through
23 the garage where the motorcycle was running
24 and went back into the house?

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1 A. A little bit fuzzy what you're
2 trying to say there.
3   MR. LEVINE: He asked for the
4 last two factors you put before him.
5   BY MR. HEINOLD:
6 Q. That he went from outside the
7 garage door that was open back through the
8 garage and into his house to talk on the
9 phone. Is that your understanding?
10 A. I would say my understanding is
11 that he walked through the garage into the
12 house. I don't know that he walked back from
13 outside. So you put that caveat on there.
14 I'm not sure that's a hundred percent -- my
15 understanding is he walked from the garage
16 into the house.
17 Q. Okay.
18 A. And the bike was running in the
19 garage. I agree with all that.
20 Q. There was a two-car garage with
21 one door opening?
22 A. Two-car garage. I don't
23 remember if it was one or two doors open, but
24 one or the other.

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1 Q. Does that matter to you?
2 A. No.
3 Q. Do you agree that on that date
4 he didn't act as he intended to act when he
5 started the motorcycle?
6 A. Sure.
7 Q. Do you believe that an
8 on-product warning that satisfies your
9 requirements, as you suggested, would have
10 caused him not to be distracted and forget the
11 motorcycle was running and then go into the
12 house?
13 A. I don't think it would have
14 caused him not to be distracted. I think it
15 would have informed him that he shouldn't let
16 the bike run at a standstill. Therefore, he
17 wouldn't have started it in the first place.
18 Q. What is your basis for that?
19 A. The basis is that he would have
20 been provided with the warning and the
21 information he needed to understand the hazard
22 and that when he was planning on doing,
23 letting it run seven to 10 minutes was not
24 safe because it could result in a fire.

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1 Q. People don't always follow
2 warnings and instructions; correct?
3 A. They absolutely do not, that's
4 why you try to eliminate them by design,
5 provide the necessary safeguards and not rely
6 upon warnings.
7 Q. But you do agree that people
8 don't always follow warnings?
9 A. I absolutely agree with that.
10 Q. And what is your basis for
11 saying that Mr. Yazdani would have followed
12 this particular warning?
13 A. A couple things. Number one,
14 he wasn't aware of the hazard that he was
15 exposed to when he started the bike to leave
16 it run for even seven to nine minutes.
17   And two, there's a litany of
18 research out there that shows if you provide
19 adequate warnings most people will follow,
20 see, understand and company with an on-product
21 warning.
22 Q. Is there some type of technique
23 to decide whether he would or would not
24 have -- I mean, you have an opinion it would

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1 have. Is there some technique, something you
2 rely on to say that Mr. Yazdani would or would
3 not have followed the warning?
4 A. Sure.
5 Q. What is it?
6 A. Well, I would look at his
7 testimony and his statements to see if there's
8 anything to indicate that he's not a
9 reasonable person that wouldn't act like the
10 majority of people would act. And I don't see
11 anything in his testimony to suggest that he
12 wouldn't have acted like the majority of
13 people or the way you expect the majority of
14 the people to act.
15   And number two, he testified
16 that he wasn't aware of the hazard before he
17 did what he did.
18 Q. Is there any literature which
19 discusses the limitations of on-product
20 warnings?
21 A. Well, I think the answer to
22 your question is that most warnings literature
23 recognize the limitations of using an
24 on-product warning saying it's a hazard,

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1 particularly when there are design regarding
2 solutions available.
3 Q. Is there any literature which
4 discusses the limitations and the
5 effectiveness of an on-product warning itself?
6 A. Well, there certainly are
7 studies that have been done on the
8 effectiveness of adequate warnings to change
9 behavior. And a good one, I don't know if I
10 referenced it or not, but it's done by Cox and
11 Wogalter, it was a Met-analysis done on the
12 effectiveness of warnings, and they showed
13 that, in fact, when you provide adequate
14 warnings they do change behavior.
15   MR. LEVINE: Can you tell her
16 the name of the two authors?
17   THE WITNESS: Cox, C-O-X, and
18 Wogalter. And then I note from my own
19 research in my own experience in designing and
20 developing on-product warnings that when you
21 provide effective and adequate on-product
22 warnings they do, in fact, change behavior.
23   BY MR. HEINOLD:
24 Q. Which studies have you

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1   researched for that?
2   A. Well, to give you an example,
3   some of the technical reports I wrote that
4   would -- on Page 9 of my C.V., second to the
5   last page, there's a technical report dealing
6   with the feasibility and competitive
7   evaluation of the IBM high rate wireless land
8   PC card, and the part of that testing had to
9   do so with testing the provisions of a warning
10 on the product.
11 Q. What was the warning?
12 A. The warning basically said that
13 the PC card needed to be installed after the
14 drivers was installed, otherwise it wouldn't
15 work. And it was a -- you want me to explain
16 all of it? Because I want to keep things
17 short.
18 Q. Thirty words or less.
19 A. When they designed the wireless
20 card they should have designed it so that it
21 worked, the install worked regardless whether
22 you put the PC card in first or not. But the
23 way they designed the driver, the driver had
24 to be installed first before the PC card.

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1   And I told them that most
2   people are going to put the PC card in first
3   and then try and install the driver, and when
4   they do that they're going to cause a problem,
5   which is going to drive the help call, service
6   call.
7   So the compromise they did for
8   the initial release of the product was to put
9   a warning on the plastic case of the PC card
10 saying, Don't install the PC until you
11 installed the driver. And that was a
12 workaround until they fixed the driver issue.
13 Q. So was that a study that you
14 did?
15 A. Yes, part of a usability test.
16 Q. Peer reviewed?
17 A. I don't know if it was peer
18 reviewed in a classical sense.
19 Q. Published?
20 A. It was published as an IBM
21 Technical Report.
22 Q. Within IBM?
23 A. Yes. It was implemented in the
24 design of the product and sold.

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1   Q. How about the effectiveness
2   study of Cox and Wogalter, was that a peer
3   reviewed study?
4   A. Yes. And the other study I was
5   looking for was the December 1999 Ideascan
6   2000, usability study and competitive
7   evaluation. And this looked at the
8   effectiveness of adding a warning to the
9   scanner to prevent another damage to the
10 scanner.
11 Q. Another IBM? I didn't find it
12 yet. What page is it?
13 A. It's on the second to the last
14 page.
15 Q. And that's another IBM internal
16 use?
17 A. Technical Report.
18 Q. Any others?
19 A. They're the only two I believe
20 that I wrote, technical reports.
21 Q. My question was literature on
22 the effectiveness and/or limitations on
23 on-product warnings?
24   MR. LEVINE: I'm sorry, can you

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1   repeat the question.
2   BY MR. HEINOLD:
3   Q. The effectiveness or
4   limitations on on-product warnings.
5   A. Well, there's other examples.
6   So, for, example, Reference 11 looked at the
7   compliance to Owner's Manuals warnings,
8   influence of familiarity and placement of a
9   supplemental directive. So in that study they
10 put a warning label, an abbreviated warning
11 label on the device pointing to the manual or
12 additional information regarding the
13 particular problem versus just having the
14 information in the manual.
15 Q. And that's a 1995 study?
16 A. Yes.
17 Q. Is that peer reviewed?
18 A. Yes, it's in the Journal of
19 Ergonomics.
20 Q. I assume you provided me with a
21 copy of that?
22 A. It's on the disk.
23 Q. Any others?
24 A. I mean, I can -- if you give me

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1   time I can come up with other ones, but
2   they're the ones that I have referenced either
3   in my report or in my C.V.
4   Q.   So let me go back to usual
5   distraction. Is it your opinion that that
6   doesn't matter because he wouldn't have been
7   doing the activity to begin with, the fact
8   that he was distracted and forgot?
9   A.   Right. The distraction is
10 irrelevant. The question is whether or not he
11 had the information he needed to leave the
12 bike in the first place.
13 Q.   Will you agree with me if Mr.
14 Yazdani had read the Manual and had understood
15 the warning and had followed the warning, he
16 would not have left the motorcycle idling at a
17 standstill in his garage on that day?
18 A.   If he followed BMW's intention
19 for the warning in the Manual he wouldn't have
20 left it running at a standstill in the garage.
21 Q.   And if he had read the Manual
22 and he had understood the Manual prior to this
23 incident, the existence or nonexistence of the
24 label you propose on the motorcycle would not

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1   matter; correct?
2   A.   That's not true.
3   Q.   Okay. Why would it matter?
4   A.   Well, first of all, the warning
5   needs to be on the bike regardless of whether
6   Mr. Yazdani ever purchases the bike. So it
7   should have been there when he got it.
8   Number two, if Mr. Yazdani did
9   happen to read the Manual, did happen to read
10 all the Manual, did happen to read all of 51
11 and 60 to understand exactly what BMW was
12 trying to communicate to him, and then
13 subsequently forgot it, the warning would have
14 reminded him at the time of location it was
15 needed. If read it and remembered it, the
16 warning on the bike would have reinforced what
17 he had read in the Manual encouraging him not
18 to do what he did.
19 Q.   Assuming he had read it, read
20 these warnings, okay, assume he understood
21 what BMW was trying to tell him about not
22 running at a standstill, idling at a
23 standstill because of the risk of fire, and
24 assume he remembered that, then the on-product

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1   warning would have -- its presence or absence
2   would have no causal effect on this incident.
3   Do you agree with that?
4   A.   It would reinforce what he had
5   read and remembered.
6   Q.   If he remembered it, does he
7   need to be reinforced?
8   A.   Sure.
9   Q.   If he remembered it and he
10 wasn't reinforced, would he still do the
11 prohibited act?
12 A.   If he remembered -- my opinion
13 is if he had read the Manual, read Pages 51
14 and 60, understood what BMW was trying to
15 communicate to him, and then practiced that
16 and recalled that at the time he wouldn't have
17 done what he did.
18 Q.   And therefore, the existence or
19 nonexistence of the label on the motorcycle
20 would have no causal effect to this incident;
21 correct?
22 A.   The only thing it would have
23 served in that purpose was to remind him and
24 reinforce what he had remembered and read and

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1   understood.
2   Q.   But if he wasn't going to do it
3   anyway, which we just agreed under my
4   hypothetical, then it wouldn't have mattered
5   whether it was on there or not; correct?
6   A.   I would agree if he knew that
7   there was a risk of fire by letting the bike
8   idle in a stationary position, decided to do
9   it anyway, the warning wouldn't have changed
10 his mind. That's why you want to eliminate
11 through design or by safeguard.
12 Q.   I want to get your opinion on
13 this clearly and cleanly.
14   We're going to assume for
15 purposes of my question that he had read the
16 appropriate pages in the Manual regarding the
17 risk of fire if he ran the engine at a
18 standstill, okay? So we're assuming that;
19 correct?
20 A.   Okay.
21   MR. LEVINE: Your question is
22 assuming that.
23   MR. HEINOLD: My question is
24 assuming that.

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1   MR. LEVINE: Fair enough.
2   BY MR. HEINOLD:
3 Q. I'm asking you to assume that.
4 A. Okay.
5 Q. And I'm asking you to further
6   assume that when he read those pertinent
7   portions of the Manual he understood the risk
8   that was being conveyed in those lines, okay?
9 A. Okay.
10 Q. And I want you to further
11   assume that he remembered it; correct? Okay?
12 A. Okay.
13 Q. If you make those three
14   assumptions, then he wouldn't need a reminder
15   on the motorcycle to change his conduct;
16   correct?
17 A. If he remembered it at the time
18   he went out to start the bike he wouldn't need
19   a reminder.
20 Q. Okay. And therefore, if he
21   read it and if he understood it and if he
22   remembered it he wouldn't -- the label,
23   whether it is there or not, is of no
24   consequence; correct?

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1   MR. LEVINE: To this case?
2   MR. HEINOLD: To this case.
3   THE WITNESS: But to causation
4   it's not, but the bike is still defective
5   without it.
6   BY MR. HEINOLD:
7 Q. Okay, I understand that. But
8   to causation it's not?
9 A. To causation, if he was aware
10   of the hazard, was thinking about it at the
11   time and recalled and made a decision, made a
12   conscious decision to disregard the
13   information he had, then the label wouldn't
14   have done anything except reinforce what he
15   read in the Manual.
16   Now, is it possible that by
17   reinforcing it it would have changed his
18   behavior, it's possible. Is it as likely as
19   if he didn't know when the warning was there
20   to tell him, I don't think it's -- we're
21   looking at degrees, that's similar of a
22   degree.
23 Q. If it was going to change
24   behavior he would do it because you already

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1   agreed that if he read it, understood it and
2   remembered it, he wouldn't be doing it in the
3   first place which is why there's no causal
4   connection, which you also agreed to; correct?
5 A. If he read it, fully understood
6   it and remembered it at the time and did it
7   anyways, like I said, the on-product warning
8   may have reinforced the manual, but I doubt it
9   would have changed his behavior if he was
10   intending to disregard what he had known and
11   remembered otherwise.
12 Q. As the owner of a motorcycle,
13   did Mr. Yazdani have a responsibility to read
14   the Manual?
15 A. If he didn't know how to
16   operate the bike, then I would suggest he had
17   a responsibility to read it.
18 Q. But if you thought he knew how
19   to operate it, it's okay with you that he
20   didn't read it?
21 A. I think it's a reasonable thing
22   that many reasonable people do often.
23 Q. But reasonable people do things
24   that they shouldn't do and they don't do

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1   things that they should do.
2   My question is not whether it
3   was reasonable to you to do, but does he have
4   a responsibility -- you're a warnings expert,
5   does the owner of the product, in this case a
6   motorcycle, have the responsibility to read
7   the Manual?
8 A. If he didn't know how to
9   operate the bike he should have read the
10   manual to find out how to operate it.
11 Q. And if he knew how -- if he
12   thought he knew how to operate it, then he has
13   no responsibility, in your opinion, to read
14   the manual?
15 A. I don't think so.
16 Q. Do you think that his failure
17   to read the manual if, in fact, he didn't read
18   the manual, gives him any responsibility for
19   this fire?
20 A. I don't think you can hold him
21   to be responsible for the fire when he wasn't
22   aware of the atypical, unique hazard
23   associated with the bike.
24 Q. But he might have been aware if

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1 he read the manual?
2 A. I doubt it.
3 Q. He might have been?
4 A. I doubt it.
5 Q. I know you doubt it.
6 A. It's my professional --
7 Q. Are you certain of it?
8 A. Within a reasonable degree of
9 scientific certainty.
10 Q. What does that mean?
11 A. It means more likely than not
12 that the information in the Manual was
13 inadequate to convey the information that BMW
14 North America is claiming they intended to
15 convey.
16 Q. That's 50.1 percent, right?
17 A. Sure.
18 Q. Are you more certain than that?
19 A. I don't have to be.
20 Q. So your answer is no?
21 A. My answer is I don't have to
22 be.
23 Q. Are you more certain than 50.1
24 percent? That's a yes or no. Either you are

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1 or you aren't.
2   MR. LEVINE: Just so when you
3 use this against him later, he at least knows
4 what question he's more than 50.1 percent.
5   MR. HEINOLD: The one that
6 we've been asking.
7   MR. LEVINE: Whether or not Mr.
8 Yazdani would have understood the risk if he
9 read the manual? Is that the question?
10 Because that's what I thought the question is.
11   MR. HEINOLD: Yes.
12   THE WITNESS: One more time,
13 please.
14   BY MR. HEINOLD:
15 Q. The question is this: Let me
16 preface the question with what you previously
17 said so we can put it into context.
18   I asked you were whether his
19 failure to read the Manual gave him any
20 responsibility for this fire, and you said,
21 no, because he didn't know the risk. And I
22 said, But could he have learned the risk if he
23 read the manual? And you said, I doubt it.
24 And I said, If you doubt it, that means

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1 there's some possibility that he would have
2 understood it? And you said, Eventually, more
3 likely than not. And I said, That means 50.1
4 percent? And you agreed. And then I said,
5 and this is the question, Are you certain
6 beyond 50.1 percent? And you said, I don't
7 have to be.
8 A. Correct. So you want me to
9 answer it again?
10 Q. No. If that's your answer,
11 then that's the one you're going to live with.
12   Do you believe that the
13 Plaintiff's failure, Mr. Yazdani -- let me
14 start that over.
15   Do you believe that Mr.
16 Yazdani's failure to understand the features
17 and characteristics of his motorcycle with
18 regard to idling at a standstill gives him
19 responsibility for this fire?
20 A. You're going to have to do that
21 one more time.
22 Q. Do you believe that Mr.
23 Yazdani's failure to understand the features
24 and characteristics of his motorcycle with

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1 regard to idling at a standstill and the risk
2 of fire gives him responsibility for this
3 event?
4 A. I don't think he's responsible
5 for it.
6 Q. Why not?
7 A. Because BMW North America
8 failed to provide adequate warning.
9 Q. And does that excuse his
10 failure to investigate the characteristics and
11 features of his bike regarding the risk of
12 fire at a standstill?
13 A. How does he know to investigate
14 it?
15 Q. I get to ask the questions.
16 A. I'm sorry. It's late in the
17 day, excuse me. I don't know that he knows
18 that he has to investigate it, that's why he
19 haven't investigated it. And he doesn't know
20 to investigate it because BMW North America
21 failed to provide adequate warning.
22 Q. Do you believe -- let's assume
23 he read it, okay, and understood it, do you
24 believe his failure to remember it gives him

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1   any responsibility for the fire?
2   A.   So you're asking me if his
3   failure to be human makes him responsible for
4   the fire? I don't think so.
5   Q.   No, that's not what I'm asking.
6   A.   Sure it is.
7   Q.   That's your interpretation of
8   and your spin as a hired gun.
9   My question is: If he read it
10 and he understood it and he forgot it, does
11 that give him any responsibility for this?
12 A.   It happens all the time.
13 Q.   Is your answer no?
14 A.   My answer is without adequate
15 warning he was not responsible for it.
16 Q.   Is your answer no?
17 A.   Without adequate warning his
18 responsibility would be no.
19 Q.   Zero?
20 A.   Sure.
21 Q.   Okay. Do you believe that Mr.
22 Yazdani forgetting that his motorcycle was
23 running in his garage and going into his house
24 gives him any responsibility for this event?

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1   A.   Not without knowing the risk.
2   MR. HEINOLD: I'd like to get
3   those copies.
4   MR. LEVINE: Sure, let me do
5   that.
6   - - -
7   (Whereupon, a short break was taken at
8   this time.)
9   - - -
10   BY MR. HEINOLD:
11 Q.   We took a break, you provided
12 me with some additional materials from your
13 notebook that you brought here. Let me just
14 ask you what some of these are.
15   MR. HEINOLD: You can mark this
16 as Vigilante-7.
17   - - -
18 (Whereupon, Exhibit Vigilante-7 was
19 marked for identification.)
20   - - -
21   BY MR. HEINOLD:
22 Q.   I think these go together. It
23 looks like a website?
24 A.   Yes, but I don't have the

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1   second page. I got them, I'm sorry.
2   Q.   Four pages?
3   A.   Yes.
4   Q.   What is that?
5   A.   It's a publication entitled
6   Sound Rider. Well, it's a website called
7   Sound Rider, a motorcyclist enthusiast
8   website, and there's an article called Half
9   A$$ Winterization.
10   And basically, it's just an
11 explanation from the author as how he
12 winterizes his motorcycle and still allows him
13 to ride during the off season when it's a
14 little bit warmer. And his process is, you
15 know, essentially what Mr. Yazdani was doing
16 on the day of the incident.
17   And he notes that he once every
18 couple weeks let's the engine run for 15 to 20
19 minutes at least once a week during the cold
20 season even if you're not riding.
21 Q.   Is that an air-cooled?
22 A.   I don't think he ever
23 references whether it's air-cooled or
24 liquid-cooled.

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1   Q.   Okay. Anything else
2   significant about that?
3   A.   No. You know, I just came
4   across an article in a rider enthusiast
5   website that explains what Mr. Yazdani was
6   doing.
7   Q.   What is the next one? Do these
8   four pages go together?
9   A.   Yes.
10 Q.   And what is that?
11   MR. HEINOLD: Let's mark that
12 as 8.
13   - - -
14 (Whereupon, Exhibit Vigilante-8 was
15 marked for identification.)
16   - - -
17   BY MR. HEINOLD:
18 Q.   Explain what Exhibit 8 is.
19 A.   It's another website for
20 motorcycle enthusiasts. The one thing that I
21 noticed in here is that the author makes a
22 statement that most people say that
23 Harley-Davidsons never overheat. And then
24 there's some examples of one of the people

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1 that commented, I don't know who it is, but
2 just an example of sitting in traffic in
3 Myrtle Beach and couldn't move and eventually
4 had to pull over and turn off because
5 the -- to cool the bike off.
6   Another guy was noticing that
7 his VTX has a fan that comes on just like a
8 car to keep the cooling even at a stopped
9 light. That was just one of the things I ran
10 into.
11   MR. HEINOLD: Let's mark this
12 as 9.
13   - - -
14 (Whereupon, Exhibit Vigilante-9 was
15 marked for identification.)
16   - - -
17   BY MR. HEINOLD:
18 Q. How about the next one?
19 A. The next one is from The
20 American Spectator. Looks like it's an
21 organization related to vehicles. The author
22 is a columnist for automotive and vehicle
23 related topics. It just gives a description
24 of air-cooled versus water-cooled engines.

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1 You know, before I involved in his case I knew
2 my vehicle was air-cooled, but I assumed and
3 believed that the purpose of the oil was to
4 lubricate and to cool the engine. And that's
5 what he was stating -- that's what the author
6 is stating in this paper, that an air-cooled
7 engine is actually an air/oil cooler.
8   And he also says that's why
9 mini bikes have external oil coolers and that
10 some of them have deep sump or additional
11 capacity oiling systems to prevent them from
12 overheating.
13   Then he makes a statement that
14 if that an engine is well-designed and factory
15 stock and in good running order, usually will
16 not overheat. And then he says: However, if
17 the engine was not well-designed or it's been
18 modified to produce additional power, or is
19 not in good tune, running lean, for instance,
20 is more vulnerable to overheating to
21 heat-related damage.
22 Q. Anything else significant about
23 that?
24 A. He also says that if you leave

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1 the bike alone, no adding upgrades to the
2 pistons or what have you, simply change the
3 oil and filter every now and then you'll
4 probably never have any problems, period.
5 Q. Anything else?
6 A. No.
7 Q. Is that a two-page article?
8 A. I also attached the -- you see
9 in your hand right there, that's just his
10 Bio. You see the Author Bio here
11 (indicating)?
12 Q. Okay.
13   - - -
14 (Whereupon, Exhibit Vigilante-10 was
15 marked for identification.)
16   - - -
17   BY MR. HEINOLD:
18 Q. What's the next one?
19 A. The next one is from a website
20 called Motorbike Writer. It's another website
21 for motorcyclists.
22 Q. And what's the significance of
23 that?
24 A. He just kind of gives a

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1 description of how people who have a tendency
2 to let their bike idle for a while and rev it
3 up to warm it up. And he states that
4 consistent with BMW that it's not good for the
5 engine.
6   He says that older motorcycles
7 with carburetors and gluggy oils require a
8 long period of warming up, but today's fuel
9 injected engines with moderate sympathetic
10 oils can go straight after you push the
11 button. So he's just kind of giving an idea
12 of different motorcycles of different age,
13 different engine styles, some require longer
14 warm-up periods than others.
15 Q. So these are -- the last
16 several Exhibits are general background
17 information, not something on what you
18 specifically rely for an opinion?
19 A. Yes, just general background
20 information.
21 Q. Is this part of the same
22 article or is that a separate one?
23 A. I think that -- nope, you're
24 right. That's a different article.

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1   MR. HEINOLD: We'll call that
2   Exhibit 11.
3   - - -
4   (Whereupon, Exhibit Vigilante-11 was
5   marked for identification.)
6   - - -
7   BY MR. VIGILANTE:
8   Q. Explain what Exhibit 11 is,
9   please.
10 A. Another website. This one is
11 revzilla.com. Revzilla is a large distributor
12 of aftermarket parts and motorcycle riding
13 accessories. And they're just giving their
14 understanding of the difference between
15 air-cooled and liquid-cooled. And they note
16 that they believe an air-cooled engine
17 operates in a water range of temperatures that
18 are considered normal. That's the other only
19 thing in there that I found interesting.
20 Q. Okay. Then we have a series of
21 photographs. Tell me what those are. Let's
22 break them down by vehicle if we can.
23 A. Yes, there's two sets then.
24 Well, actually, there's four sets. There's

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1   four pages of a blue Yamaha motorcycle.
2   Q. Okay.
3   MR. HEINOLD: We'll call that
4   Exhibit 12.
5   - - -
6   (Whereupon, Exhibit Vigilante-12 was
7   marked for identification.)
8   - - -
9   BY MR. HEINOLD:
10 Q. Is there a model or year
11 designated?
12 A. Yes.
13 Q. What is it?
14 A. It's a 1998 Yamaha YZF R1.
15 It's 1,000 CC motor.
16   MR. HEINOLD: I'm just going to
17 put a 1 on here because it didn't make it
18 through the copy on the Exhibit.
19   MR. LEVINE: Okay, sure.
20   BY MR. HEINOLD:
21 Q. Okay. What's the significance
22 of it?
23 A. Well, I took the pictures
24 because A, they're -- you know, it's a sports

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1   bike manufacturer that put a warning on the
2   gas tank and then another warning on the
3   windshield. So just an example of a motorcyle
4   manufacturer putting warnings directly on the
5   bike itself.
6   Q. Those are actually the same
7   warnings as the prior photograph of Exhibit;
8   correct?
9   A. It's the same, same one?
10 Q. Same bike or --
11 A. Same bike.
12 Q. I was looking for the other
13 Exhibit. Exhibit 6, is that the same -- it's
14 not the same bike?
15 A. Vigilante-12 is different than
16 Vigilante-6.
17 Q. Okay. But the warning is the
18 same. Is this the one I read from earlier?
19 A. Yes.
20 Q. We just didn't mark it?
21 A. Yes. There's two other
22 pictures in here and they just depict the
23 location of the oil sight glass, the right
24 side of the bike. And in the pictures you can

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1   see that when the bike is on its center
2   kickstand, which is -- you can see the oil
3   halfway up the oil sight glass.
4   Q. Which picture is that?
5   A. Let me pick it up for you.
6   There it is.
7   Q. I have a four-page Exhibit.
8   It's the last page?
9   A. The bottom one on the last
10 page.
11 Q. Is this upside down?
12 A. No.
13 Q. Are you looking at it correctly
14 or am I looking at it correctly?
15 A. This is the orientation of the
16 bike (indicating).
17 Q. Yeah, okay.
18 A. So the oil level is this dark
19 liquid here (indicating). So the top picture
20 and then the picture on the preceding page is
21 the bike on the left kickstand. You'll see
22 the oil is not in the oil sight glass. The
23 oil is on the left side of the engine.
24 Q. Okay. And we have some more

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1 pictures?
2 A. Yes, the next two pages are a
3 BMW F800 GS 2010.
4 Q. What's the significance of
5 this?
6 A. That's a 2010 BMW sport bike
7 and they're using a dipstick on the left side
8 of the crane case that's depicted in the top
9 photograph.
10 Q. Okay.
11   - - -
12 (Whereupon, Exhibit Vigilante-13 was
13 marked for identification.)
14   - - -
15   BY MR. HEINOLD:
16 Q. Then there's a one-page
17 article?
18 A. Yes, that is just stating that
19 IIHS has categorized BMW R 1150 and the Yamaha
20 YZF R1 as essential sport bikes or super sport
21 bikes. The only reason I pulled that is just
22 to show they're in the same classification as
23 opposed to a cruiser type bike.
24 Q. I'm not going to bother marking

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1 that one, unless you --
2   MR. LEVINE: No.
3   BY MR. HEINOLD:
4 Q. Then the last photos?
5 A. The last photos are three
6 different bikes, but they're all the BMW
7 R 1100 RSL. So I believe this was the model
8 bike that was involved in the NHTSA recall.
9   - - -
10 (Whereupon, Exhibit Vigilante-14 was
11 marked for identification.)
12   - - -
13   BY MR. HEINOLD:
14 Q. And that's it for the
15 materials, right?
16 A. Yes, you took the other Exhibit
17 photos I had and marked those as Vigilante-6.
18 Q. You need those back.
19   MR. HEINOLD: Ken, can you make
20 a copy of this Exhibit?
21   MR. LEVINE: Yes.
22   MR. HEINOLD: Whenever you get
23 a chance.
24   MR. LEVINE: Okay.

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1   BY MR. HEINOLD:
2 Q. Now, the last area I want to
3 cover is your comments and report on Mr.
4 Breen's report. You had some criticisms of
5 his report and his conclusions and
6 inaccuracies.
7   If it's all right with you, I'd
8 like you just to take me through it, point out
9 what they are and explain what it is.
10   Would that be satisfactory for
11 me to understand that?
12 A. I can try.
13 Q. Okay. If I have a follow-up
14 I'll ask it.
15 A. Let's go, the bottom of Page 3,
16 he notes that when Yazdani purchased the
17 motorcycle it was a used unit, he received and
18 read this manual. And one of the things I was
19 thinking is that I don't know that anyone ever
20 established that Yazdani was given the
21 R 1150 R, R850 Manual.
22   In the deposition, his
23 deposition they talk about it in generalities
24 and then show him the manual, but I don't

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1 think they ever validated that's the manual
2 all he received. And I did have a question
3 about that so I marked that.
4   On Page 4, second paragraph,
5 Mr. Breen states that motorcyclists tend to be
6 enthusiasts and into the sport of motorcycling
7 and knowledgeable about the features of their
8 motorcycles as well as competitor models. And
9 he offers no proof to that statement, and it's
10 generalized statement without any proof or
11 insight into how much information people
12 have.
13   At the end of that paragraph he
14 states: All of these activities tend to make
15 motorcyclists more aware of their riding
16 environment and the nature of their motorcycle
17 compared to many average owners of passenger
18 vehicles. And again, I noticed that's pure
19 speculation and generalization. No proof to
20 support that.
21 Q. Okay. For the record, you're
22 against pure speculation, generalization and
23 no proof?
24 A. Sure, I try to provide support

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1   for all my opinions.
2   Q.   Okay, I just want to be sure.
3   What's next?
4   A.   The next paragraph he states:
5   On-product labeling has significant
6   substantial to deteriorate.
7   And although that is possible
8   for poorly designed warnings, certainly many
9   warnings on vehicles are designed to be a
10   hardy and stand up to the elements as the 1998
11   Yamaha YZF photos I produced show.
12   He also states: There is a
13   limited space available on motorcycles to
14   provide label.
15   And again, that's a half true
16   statement. That certainly a motorcycle is not
17   a tractor trailer with 53 feet of real estate,
18   there's still significant space to add a
19   label, depending upon the issue and where it's
20   applicable. Then I also note that contrary to
21   his two points, BMW North America added an
22   on-product warning to deal with their recall
23   defect.
24   Page 6, top of the

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1   paragraph --
2   Q.   Do you recall what Mr.
3   Yeldham's explanation for that was?
4   A.   Explanation for what?
5   Q.   Adding the on-product warning
6   to the motorcycle itself?
7   A.   Yes, it was to inform people of
8   the potential fire hazard.
9   Q.   Okay. What's next?
10   A.   I'm sorry?
11   Q.   That's what you recall?
12   A.   That's what he testified. I
13   was going to go to the page. He testified on
14   Page 171: BMW AG decided to send out, put on
15   label, on the bike itself to reduce the risk
16   of fire occurring in bikes already on market.
17   175: They added label because
18   there was a risk of fire and they wanted to
19   make the end user aware of the risk.
20   Back to the report?
21   Q.   Yes.
22   A.   Page 6, top of Page 6 he
23   states: The approach of -- the information
24   provided in the manual addresses the issue of

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1   potential for overheating, fire if motorcycle
2   is allowed to run for prolonged periods in a
3   clear and concise manner. This approach is
4   consistent with the strategy to communicate
5   similar information utilized by other
6   motorcycle manufacturers, air-cooled engine
7   vehicles, including Suzuki, Harley-Davidson
8   and Yamaha. This approach is appropriate and
9   consistent within the motorcycle industry and
10   is safe and appropriate.
11   And I note that Yamaha and
12   Harley-Davidson do not require that you ride
13   away immediately. So their approach -- BMW's
14   approach is not consistent with Yamaha and
15   Harley-Davidson as he states.
16   Q.   How about Suzuki?
17   A.   I don't know that I looked up
18   the Suzuki manual.
19   Q.   Go ahead.
20   A.   In the third paragraph he
21   states: Yazdani reportedly started his engine
22   in the high idle choke position and then left
23   the engine riding for approximately 30
24   minutes.

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1   This is two points. One is it
2   was required to start it in the high idle
3   choke position. And two, he forgot to add
4   that the idle had to go down to detent,
5   because to keep it in high you have to keep
6   pressure on the choke switch, and when you
7   release it it goes to detent. So it wasn't
8   left in high idle. He kind of missed that
9   point.
10   He says: Leaving it go for 30
11   minutes is well beyond a reasonable or normal
12   warm-up period. But he misses the point that
13   it's foreseeable.
14   He say: The engine is not
15   intended to be warmed up or operated in this
16   manner. So he misses the point again that it
17   is foreseeable to BMW.
18   And he also says that: The
19   engine will build up heat if left on full
20   choke position for an extended period of
21   time. Again, apparently doesn't realize that
22   the choke switch had to move down to detent
23   and not full choke after he released the choke
24   button.

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1   MR. LEVINE: You keep using the
2 term detent.
3   THE WITNESS: Yeah, there's
4 a --
5   MR. LEVINE: I just want you to
6 spell it.
7   THE WITNESS: Oh, I'm sorry,
8 D-E-T-E-N-T.
9   MR. LEVINE: Thank you.
10   THE WITNESS: So he says at the
11 bottom of that section: The subject incident
12 was solely related to a situation in which
13 Yazdani did not follow his standard practice
14 and became mentally distracted.
15   And I put the comment in
16 there: So it's okay for BMW to let his house
17 burn down and possibly kill or hurt someone
18 because he got distracted rather than fix the
19 design for him.
20   Next section, he says: That
21 sight glass is easier to use. And my question
22 is, Says who? Dipsticks have been used for
23 decades. And then I've never seen any
24 research to suggest the sight glass is easier,

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1 and I never saw any research that said why
2 they needed to change to sight glass if it
3 introduces a new risk.
4   He says: Air-cooled engines
5 and motorcycles have a long history of
6 successful and acceptable use. And I comment
7 that my air-cooled Harley-Davidsons with
8 dipsticks can be left idling for 30 minutes
9 without spraying hot oil into the environment
10 and causing a fire. And that to me would be a
11 good reason why air-cooled engines have
12 been -- have a long history of success in
13 acceptable use as opposed to the design of
14 this BMW engine.
15   Later on in that paragraph he
16 says: The general concept is that when the
17 engine on the motorcycle is running, the
18 vehicle is moving, except during short periods
19 during warm-up or in traffic. He does not
20 define short.
21   And I got to tell Mr. Breen
22 that I sat in traffic jams longer than 30
23 minutes, and prior to this case I never
24 thought that a potential fire was a potential

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1 risk of sitting in traffic for that long.
2   BY MR. HEINOLD:
3 Q. Where was this? What
4 paragraph?
5 A. That's the second from the
6 bottom (indicating).
7 Q. Okay.
8 A. Next paragraph he says: The
9 police fan kit is specifically designed for
10 motorcycles that will be used in a manner in
11 which they may be sitting idle for extended
12 periods of time to run equipment and/or
13 maneuvering at general low speeds. And it's
14 especially useful to riders such as patrol
15 officers who may be riding at slow speeds for
16 extended periods of time.
17   And again, my point is riding
18 at low speeds for extended periods of time is
19 foreseeable, and obviously BMW knew it was
20 foreseeable because they provided an option
21 for some of their bikes.
22   Top of Page 7: An air-cooled
23 engine --
24 Q. Can I just stop you and ask you

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1 this question: You don't -- do you intend to
2 offer an opinion about the efficiency of the
3 police van kit?
4 A. No, I'm going to leave that to
5 Mike Zazula.
6 Q. Okay. Then I won't ask you
7 about that.
8 A. Top of Page 7 he states: An
9 air-cooled engine on a motorcycle is widely
10 accepted and is not an unsafe or unreasonable
11 design configuration. My question is then
12 what makes the BMW different that a fire --
13 the oil sight glass can fail causing fire.
14   Next paragraph he says: The
15 system utilized by BMW is consistent with that
16 of the motorcycle industry and safe for the
17 intended purposes. And I note that it's not
18 even consistent with BMW's own practices
19 regarding the hazard.
20 Q. That being the --
21 A. The warnings.
22 Q. -- the choke that you talked
23 about?
24 A. The warning, the warning in the

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1 manual.
2 Q. You're saying it's not
3 consistent with --
4 A. BMW's practice regarding
5 similar hazard.
6 Q. I don't know what you mean by
7 its own practice regarding similar hazard.
8 Can you explain that?
9 A. Sure. I apologize, the start
10 of that paragraph goes into my report -- my
11 report is primarily focused on allegations
12 that the product information or warnings
13 provided by BMW were inadequate and were the
14 cause of this incident. And he's saying that
15 this system utilized by BMW is consistent with
16 that of motorcycle industry and safe for the
17 intended purposes.
18   And I'm saying it's not even
19 consistent with BMW North America's practice
20 regarding the similar type hazard. And, of
21 course, that's the recall and their decision
22 to place a warning on the bike regarding the
23 fire risk of leaving it sit stationary.
24 Q. Okay.

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1 A. The next paragraph he gets into
2 risk prioritization, and the risks that are
3 the most significant in terms of frequency
4 and/or severity should be given priority. I
5 agree with that.
6   However, what he forgets and
7 doesn't deal with is that what also works its
8 way into prioritization is the expected
9 knowledge of the user and whether or not the
10 hazard is created by something that is
11 atypical or unique of that product as opposed
12 to the rest of the industry.
13   And in here we have a case
14 where you have the potential for severe injury
15 or death or property damage, which is the
16 highest severity you can get. And you have
17 everyone that gets on this is potentially
18 exposed, and you have a very low expected
19 knowledge, and it's not consistent with
20 features of other bikes that don't get catch
21 fire if allowed to sit and idle for 15, 20, 30
22 minutes.
23 Q. Tell me what the next paragraph
24 begins with.

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1 A. Warning Related Information.
2 The second to the last sentence he says:
3 There is always a significant question as to
4 if any individual follow or heed any specific
5 warning, sign or label. And we talked about
6 this earlier in the deposition, and I note in
7 his report that is why you eliminate by design
8 or guard as preferred, particularly over a
9 warning buried in a manual.
10   The next paragraph he says:
11 The common practice in the motorcycle
12 industry, et cetera. And I note, again, he's
13 failing to note that it's not consistent with
14 BMW North America's own practice regarding a
15 similar hazard risk.
16   The next paragraph, the end of
17 the paragraph he states: In terms of risk
18 hierarchy an attempt to provide this
19 information in the form of on-product label
20 would not be appropriate. And I simply
21 state: No, he is not following the safety
22 hierarchy. If he was, he would recognize that
23 eliminating the risk for alternative design,
24 providing a guard and then an on-product

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1 warning would be the appropriate way in which
2 to follow the risk hierarchy.
3 Q. The safety hierarchy being --
4 A. Design.
5 Q. Design, guard, warn?
6 A. Yes.
7 Q. Okay.
8 A. The next paragraph is where he
9 really comes off the boat. He says that: The
10 risk of a fire due to the motorcycle being
11 allowed to run without moving for prolonged
12 periods is relatively low and has a relatively
13 low severity. And it's the last part that I
14 take exception with. Potentially killing
15 somebody, burning down their house is the
16 highest severity you can give to a hazard.
17 How he can say it's relatively low is
18 completely beyond me.
19 Q. Okay. You're not aware of any
20 personal injury, are you?
21 A. Related to the oil sight glass
22 failing?
23 Q. Yes.
24 A. No, but the potential is there.

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1 Q. You're talking there simply
2 about potential?
3 A. When you do your risk analysis
4 you're basing it upon potential. It's
5 inappropriate to wait and get the product in
6 the field and possibly kill somebody before
7 you decide whether or not it's a hazard you
8 should have dealt with through design.
9 Q. Are there other risks with
10 regard to operating a motorcycle, a higher
11 risk potential?
12 A. Well, there's more chance that
13 you can hurt yourself if you're going at a
14 high speed, but it's a different issue and a
15 different topic that what we're dealing with
16 here.
17 Q. Well, I understand that, but if
18 you're looking at the comparison of the
19 various risks that come with being a
20 motorcycle owner --
21 A. Well, here's the comparison,
22 because I was getting to that in the end of
23 that paragraph, the other risk associated with
24 letting it run idle is overheating.

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1 Overheating can cause problems to the
2 mechanical functioning of the bike, but it's
3 not going to burn your house down. So that
4 would be a less severe risk. Burning your
5 house down and potentially killing the
6 occupants of it is a very severe, most severe
7 hazard.
8   So another point I wanted to
9 make with that is he says: That enthusiast
10 level motorcycle riders, and I don't know how
11 he defines enthusiast level, or whether
12 Yazdani was an enthusiast level, but
13 apparently they understand that an air-cooled
14 engine needs air flow to cool. When attended
15 there are other warnings to riders that the
16 motorcycle engine is overheating. These
17 warnings include radiating heat and
18 understanding the engine runs heat will
19 develop. And these are the warnings that he's
20 talking about, alert the rider to the fact
21 that the engine may overheat. It doesn't
22 alert them to the fact that the oil sight
23 glass is going to fail, allow hot oil to
24 escape and ignite and cause a fire. So there

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1 are two different issues and they need to be
2 looked at separately.
3   And the knowledge of motorcycle
4 riders or owners of this product need to
5 consider their knowledge with respect to the
6 potential for the glass to fail and the fire
7 to occur, not whether it's going to overheat
8 or not.
9   The next page after the
10 pictures he says that: In addition, the
11 Service Bulletin can include a label to be
12 affixed to the front portion of the motorcycle
13 regarding the potential for overheating and/or
14 fire. And he's calling the recall Service
15 Bulletin. He says: An on-product advisory
16 label is not appropriate as this represents a
17 change in the information -- I'm sorry, it
18 says: An on-product advisory label --
19   MR. LEVINE: She's trying to
20 understand. Try to keep her in mind while
21 you're answering the question.
22   THE WITNESS: Okay. He says:
23 An on-product advisory label is not
24 inappropriate as this represents a change in

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1 the information provided to users for this
2 specific model. The Service Campaign was
3 based on a limited number of incidents and no
4 reported injuries. And I note it's the same
5 type of hazard. It's the same issue. The
6 rider is not aware of the risk of not riding
7 away immediately.
8   And the argument for why it's
9 okay for the Service Bulletin/Recall to
10 include the label is completely contrary to
11 the same argument he just made on Page 7 as to
12 why it wasn't needed. That is, low risk, no
13 injury and people should know.
14   So if there's low risk, no
15 injury, people should know, and that's why
16 it's not needed, as he argues on Page 7, how
17 does he argue that a low risk, no injury,
18 people should know, Page 8, it's okay to have
19 it an on-product warning. To me they appear
20 to be completely conflicting opinions.
21 Q. Weren't there two different
22 issues involved with the motorcycle? He's
23 talking about with the on-product label in the
24 Service Campaign versus Mr. Yazdani's

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1 motorcycle?
2 A. The Recall Campaign was for a
3 fire hazard associated with letting the bike
4 sit at idle, stationary for an extended period
5 of time.
6 Q. And what was the specific
7 hazard that was recognized?
8 A. It was a fire hazard. That was
9 the hazard.
10 Q. That's very general. That
11 wasn't my question. What was the specific
12 issue that was going to cause the fire?
13 A. The fire was going to be caused
14 by letting the bike sit idle for an extended
15 period of time having the exhaust eat up and
16 potentially igniting the fairing. Regardless
17 of the underlying mechanism of the fire, the
18 risk is still the same. If you let the bike
19 sit at a standstill for a prolonged period of
20 time you get a fire. It's the same hazard,
21 fire hazard.
22 Q. On Mr. Yazdani's bike what is
23 the risk of catching the lower fairings on
24 fire?

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1 A. There is no lower fairing.
2 Q. The risk would be --
3 A. The risk would be the oil sight
4 glass failing.
5 Q. The risk of that would be zero;
6 correct?
7 A. The risk of the fairing
8 catching on fire would be zero, but the
9 hazards --
10 Q. So that risk is different than
11 the risk of the oil sight glass failure;
12 correct?
13 A. It's the same hazard and the
14 same behavior of the operator that's
15 associated with the hazard. The ignition
16 scenario may differ, but it's the same
17 result. You have a fire to an unattended or
18 maybe even it's an attended motorcycle that's
19 allowed to sit at a standstill.
20   He states in the next
21 paragraph: A warning was never intended nor
22 can warning address issues related to
23 distraction. Two points there. Number one,
24 the potential for distraction is why you want

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1 to eliminate hazards through design to provide
2 safeguards so you don't have to rely upon the
3 weakest link in the chain, that is the human
4 and all their frailty.
5   Two, warnings are used to
6 overcome distraction. Most typically audible
7 warnings are used to grab a person's attention
8 who's attention is focused elsewhere. That's
9 the whole intent and purpose of the warning.
10 Q. Is an audible warning practical
11 in this circumstance?
12 A. I didn't assess whether or not
13 it was practical. Is it possible, I think
14 that if you give me a second there was an
15 expert in the Amsdale vs. BMW North America
16 that opined that they could have provided an
17 indicator light on the master -- excuse me,
18 the -- it says, I'll read it. I'm a little
19 bit tied up with my words at the moment, I
20 apologize: The model R 1150 GS has a
21 well-designed warning panel with lights
22 including a master warning light and an oil
23 temperature gauge. However, there was no
24 reference on the panel to as what the oil

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1 temperature reading should be to indicate to a
2 rider that his or her engine is up to a safe,
3 operating temperature and he or she should
4 turn off the choke and drive away.
5 Q. Does that have any relevance in
6 Mr. Yazdani's situation?
7 A. Well, it -- the reason I
8 brought it up was that you said it would be
9 impractical or not feasible to put an audible
10 indicator in this case.
11 Q. No. I asked if it was.
12 A. And my response was that
13 apparently there's another expert that felt it
14 was possible to include an indicator light to
15 monitor the heat of the engine. If you can
16 put an indicator light to monitor the heat of
17 the engine, you can put an audible indicator
18 in conjunction with it. That was the point I
19 was trying to make.
20 Q. Are you advocating that here?
21 A. No, I'm not, but you asked.
22 Q. Okay.
23 A. And I was also pointing out the
24 fact that his statement that warning was never

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1   intended or can warning address issues related
2   to distraction is just plain wrong.
3   Q. Well, the way we got on this
4   audible warning is because you said it's wrong
5   because you could put an audible warning on
6   there and we do it all the time. And then I
7   said, Are you advocating that? And then you
8   went to the other expert. So you brought up
9   the audible warning.
10   And now I'm asking you: Are
11 you advocating that?
12 A. If it's feasible, absolutely.
13 Q. Are you advocating that in this
14 case? It's not in your report.
15 A. I'm not aware of anybody
16 advocating the audible warning. The point I'm
17 making is that he made an incorrect statement,
18 he made a false statement, and I was pointing
19 out why it was false, why warnings are used to
20 capture the attention of people who may
21 otherwise be distracted.
22   I pointed out that another
23 expert thought you could put an indicator
24 light onto this bike to alert people to an

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1   overheat condition. And if you can put the
2   indicator light on, you can put an audible
3   warning on it.
4   At the end of that paragraph he
5   says: This would not have impacted him
6   because -- this would not have impacted him
7   becoming distracted.
8   And my comment was he misses
9   the point, it has nothing to do with him being
10 distracted, because it would have prevented
11 him from starting it and letting it idle in
12 the first place.
13   His findings, Finding Number 2,
14 he states: Configuration of the motorcycle,
15 including the air-cooled engine and oil sight
16 glass is an appropriate design and does not
17 pose an unreasonable risk. And I say that's
18 false. It's a design that introduced a risk
19 that doesn't exist with the dipstick,
20 including the dipstick on my Harley-Davidson
21 that won't fail and spray hot oil from the
22 engine and cause a fire.
23   So you've introduced a feature
24 that may have some benefits, but it introduced

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1   risks, unnecessary risks to the product. That
2   means it is not reasonable.
3   Finding 3, he says: The manner
4   in which BMW provided information is
5   consistent with that in the motorcycle
6   industry. I just point out that it's not
7   consistent with BMW North America's own action
8   regarding a similar issue.
9   Number 4: There's no need to
10 provide an on-product warning label that
11 indicates that the engine if run without
12 moving for a prolonged period of time, that
13 the engine can overheat and may result in a
14 fire. Potential for engine overheating is
15 common knowledge. My point is that it's not
16 common knowledge that the oil sight glass is
17 going to fail and cause a fire.
18   Number 5, he says: That is not
19 the situation that would have been prevented
20 with an on-product label. And I counter the
21 fire occurred because Yazdani didn't know that
22 leaving the bike idle stationary could cause
23 the oil sight glass to fail and cause a fire.
24 Had they provided an adequate warning on the

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1   bike he would have been alerted to it,
2   informed of it and complied with it.
3   Q. Are you aware of any advantages
4   that the sight glass, oil sight glass might
5   have over a dipstick?
6   A. I think that it's provided so
7   that you get a reading without having to
8   remove the dipstick, and potentially to get
9   oil dripping on the surface of the bike.
10 Q. Anything else?
11 A. I think that's the only thing I
12 recall being mentioned.
13 Q. So you're relying on what he
14 said rather than your independent knowledge of
15 the design of a motorcycle for that; correct?
16 A. Yes, I didn't see a real
17 benefit of it other than you don't have to
18 pull the dipstick out. But then, again, I
19 check my oil sitting on my bike. To do it
20 with an oil sight glass I got to stop, get off
21 the bike and check the oil I don't really see
22 the benefit of it. If there's another
23 benefit, I'm not aware of it.
24 Q. What's the consequence of oil

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1   dripping onto the engine?
2   A. Well, first of all, if it drips
3   on the engine it's probably just going to burn
4   off. But typically, the dipstick is in the
5   oil pan. On my Harleys they're on the right
6   side of it behind the engine. They may drip
7   on the chrome, but I can wipe it off. They
8   may drip on the exhaust, but I can wipe it
9   off.
10 Q. What if the exhaust is real
11 hot?
12 A. It's not that big of a deal.
13 Q. Any disadvantages of the use of
14 a dipstick?
15 A. Well, I think that's what they
16 said, the advantage was that you don't have to
17 worry about getting oil on things. I mean,
18 we're talking about a dipstick. We're not
19 talking about a fountain of oil coming out of
20 this thing.
21 Q. Anything else?
22 A. There shouldn't be a whole lot
23 of oil dripping off of it. Yeah, I'm not
24 aware of anything else offhand.

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1   Q. Any advantages or disadvantages
2   of having a sight glass on one side of the
3   engine or the other, and if so, what it's
4   depended on?
5   A. I'm not aware of the advantages
6   or disadvantages of having it on -- I'm not
7   aware of the advantages of having it on the
8   left side. It's my understanding the oil is
9   supposed to be checked with the bike on the
10 center stand, not the left side, so that the
11 engine is level.
12   So if you had it on the right
13 side, in the same position on the right side
14 as you could, and I'm not saying you could,
15 but if you had it on the right side and you
16 checked it on the center stand it shouldn't
17 make a difference.
18   If it's something unique to the
19 way they designed that engine, you know, it's
20 possible. I don't know offhand. I haven't
21 seen anybody explain from BMW why it's on the
22 left side, not the right side.
23 Q. But you don't have an
24 explanation one way the other?

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1   A. I don't know. I pointed to
2   that Yamaha YZF as an example of the
3   manufacturer putting it on the right side.
4   And again, the oil is checked when the bike is
5   upright, not leaning on its left side
6   kickstand.
7   Q. Are you intending to offer the
8   opinion in your discussions about this
9   motorcycle that the product is defective
10 because it uses an oil sight glass, or is that
11 going to be left to somebody else?
12 A. Yes. Again, it's my assumption
13 that the hazard is created by the use of the
14 oil sight glass and the makeup of the oil
15 sight glass, the material they chose. And I'm
16 relying upon Mark Yeldham for that testimony.
17 Q. But you're not --
18 A. And Mike Zazula.
19 Q. But you're not going to offer
20 that opinion in terms of product defect,
21 whether it is or isn't defective without -- I
22 think we're clear, you're going to describe it
23 as a characteristic that has this potential
24 consequence and therefore --

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1   A. I'm going to characterize it as
2   a defect that allows the risk, fire risk to
3   exist.
4   Q. Are you -- all right. Do you
5   consider any motorcycle that uses an oil sight
6   glass defective?
7   A. I don't, but I don't know of
8   any others that have this type of melting
9   point with it being placed on the left side of
10 the crank case and having the hot oil touch it
11 and being the reason why it's deformed.
12 Q. Do you know what the design of
13 the seal around any other oil sight glass is?
14 A. I do not.
15 Q. Is it your opinion that if an
16 oil sight glass is on the left side of the
17 engine that the motorcycle is defective
18 because of that?
19 A. Not necessarily because it's on
20 the left side of the engine, but if it's going
21 to be on the left side of the engine and
22 deformed when exposed to foreseeable
23 temperatures, that is a design defect.
24 Q. And you define foreseeable

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1 temperatures as what?
2 A. Well, the report of fire is
3 anywhere from 10 minutes to 30 minutes.
4 Q. Anything else?
5 A. No.
6 Q. Have we fairly covered the
7 opinions that you're intending to express in
8 the trial of this case?
9 A. I don't -- I can't think of
10 anything that we missed.
11 Q. Okay. Have we fairly covered
12 the basis for your opinions?
13 A. I can't think of anything that
14 we missed.
15   MR. HEINOLD: Okay, we're done.
16 Thank you.
17   THE WITNESS: I would like to
18 read and sign.
19   - - -
20 (Whereupon, the deposition was
21 concluded at 4:50 p.m.)
22   - - -
23
24

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1   C E R T I F I C A T E
2   I, Debra J. Veneziale, a Court Reporter
3 and Notary Public, do hereby certify that the
4 proceedings, evidence, and objections upon the
5 deposition of WILLIAM J. VIGILANTE, JR., PhD,
6 CPE are contained fully and accurately in the
7 stenographic notes taken by me upon the
8 foregoing matter on March 15, 2016, and that
9 this is a true and correct transcript of the
10 same.
11
12
13   _____
              Debra J. Veneziale
              Court Reporter
14   Notary Public
              My Commission Expires
15   July 16, 2019
16
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20 transcript does not apply to any reproduction
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24

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